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In the Supreme Court of the United States

October Term, 1973

No. 73-669

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 19, 1973

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT The great importance of the novel Seventh Circuit interpretation and construction of the involved sections of the Interstate Commerce Act is underscored by the direct and the potential ramifications of the decisions below in an enormous volume of related cases presently pending throughout the United States. Direct and substantial conflicts with prior rulings of this Court are presented. The manifest injustice of the results, coupled with the lack of uniformity in results to date, indicates the necessity for the exercise of this Court's powers of supervision and for prompt resolution of the issues presented.	7
CONCLUSION	19
APPENDICES:	
A. Synopsis of Related Litigation	A-1
B. Increased Rates and Charges from, to, and between Middlewest Territory, I.C.C. Docket 34971:	
(1) Order instituting investigation	B-1
(2) Order containing evidentiary requirements and setting hearing	B-4

(3) Order granting continuance B-11
(4) Report and Order of June 5, 1969 ..... B-13
(5) Order of August 29, 1969 ..... B-31
(6) Order of October 27, 1969 ..... B-33
(7) Order of June 18, 1970 ..... B-35

C. Admiral-Merchants Motor Freight, Inc. v. United States, D. Colo. Civil No. 2030:

(1) 321 F. Supp. 353 (D. Colo., 1971) C-1
(2) 404 U.S. 802, aff'g 321 F. Supp. 353 ..... C-17
(3) 404 U.S. 987, reh. denied C-18

D. Aluminum Company of America v.

(1) Admiral-Merchants Motor Freight, Inc., et al., 337 F. Supp. 674 (N.D. Ill., 1971) (granting 3 summary judgments) D-1

(2) Admiral-Merchants Motor Freight, Inc., et al., [unreported] (N.D. Ill., 1971) (granting petition for fees) D-15

(3) Admiral-Merchants Motor Freight, Inc., et al., 337 F. Supp. 683 (N.D. Ill., 1972) (denying new trial) D-19

(4) Burlington Truck Lines, Inc., et al., 342 F. Supp. 166 (N.D. Ill., 1972) (granting 8 summary judgments) D-30

(5) Admiral-Merchants Motor Freight, Inc., et al., 42 U.S. L. W. 2072 (7th Cir., 1973) (aff'g trial court) D-54

(6) Admiral-Merchants Motor Freight, Inc., et al., [unreported] (7th Cir., 1973) (denying reh. and denying en banc hearing) D-68

(7) Admiral-Merchants Motor Freight, Inc., et al., [unreported] (7th Cir., 1973) (granting additional attorney fees) D-70

TABLE OF AUTHORITIES

Cases	Page
Admiral-Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353 (D. Colo., 1971)	C-1
Admiral-Merchants Motor Freight, Inc. v. United States, 404 U.S. 802, 30 L. Ed.2d 37, 92 S. Ct. 51 (1971)	C-17
Admiral-Merchants Motor Freight, Inc. v. United States, 404 U.S. 987, 30 L. Ed.2d 371, 92 S. Ct. 443 (1971)	C-18
Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc., et al., 337 F. Supp. 674 (N. D. Ill., 1971)	D-1
Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc., et al., 337 F. Supp. 683 (N. D. Ill., 1972)	D-19
Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc., et al., 42 U.S. L. W. 2072 (7th Cir., 1973)	D-54
Aluminum Company of America v. Burlington Truck Lines, Inc., et al., 342 F. Supp. 166 (N.D. Ill., 1972)	D-30
Amana Refrigeration, Inc. v. Bruce Transfer & Storage Co., ____ F. Supp. ____ (N.D. Iowa, 1973)	7, 10
Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway, 284 U.S. 370, 76 L. Ed. 348, 52 S. Ct. 183 (1932)	16
Arrow Transportation Co. v. Southern Railway, 372 U.S. 658, 10 L. Ed.2d 52, 83 S. Ct. 984 (1963)	13, 14
Atchison Topeka & Santa Fe Railway v. Wichita Board of Trade, ____ U.S. ____, 37 L. Ed.2d 350, 93 S. Ct. ____, 41 U.S. L. W. 4905 (1973)	15

Baer Bros. Mercantile Co. v. Denver & Rio Grande Western Railroad, 233 U.S. 479, 58 L. Ed. 1055, 34 S. Ct. 641 (1914) 16

Baldwin Scott County Milling Co., 307 U.S. 478, 83 L. Ed. 1409, 59 S. Ct. 943 (1939) 13, 16

Boston & Maine Railway v. Hooker, 233 U.S. 97, 58 L. Ed. 868, 34 S. Ct. 526 (1914) 16

Burlington Truck Line v. United States, 371 U.S. 156, 9 L. Ed.2d 207, 83 S. Ct. 239 (1962) 17

Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264, 78 L. Ed. 307, 54 S. Ct. 154 (1933) 13

Champlin Refining Co. v. United States, 329 U.S. 29, 91 L. Ed. 22, 67 S. Ct. 1 (1946) 14

Davis v. Portland Seed Co., 264 U.S. 403, 68 L. Ed. 762, 44 S. Ct. 380 (1924) 16

Federal Trade Commission v. Jantzen, Inc., 386 U.S. 228, 18 L. Ed.2d 11, 87 S. Ct. 998 (1967) 11

Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 96 L. Ed. 1081, 73 S. Ct. 800 (1952) 14

Feinstein v. New York Central Railroad, 159 F. Supp. 460 (S.D. N.Y., 1958) 16, 18

Gulf, Colorado & Santa Fe Railway v. Hefley, 158 U.S. 98, 39 L. Ed. 910, 15 S. Ct. 802 (1895) 13

Hope Natural Gas Co. v. Federal Power Commission, 196 F.2d 803 (4th Cir., 1952) 14

Interstate Commerce Commission v. Atlantic Coast Line Railroad, 383 U.S. 576, 16 L. Ed.2d 109, 86 S. Ct. 1000 (1966) 14

Interstate Commerce Commission v. Inland Waterways Corp., 319 U.S. 671, 87 L. Ed. 1655, 63 S. Ct. 1296 (1943) 18

Isbrandtsen Co. v. United States, 96 F. Supp. 883 (S.D. N.Y., 1951) 17

Keogh v. Chicago N.W. R.R., 260 U.S. 159 (1922) 11, 18

Lewis-Simas-Jones Co. v. Southern Pacific Co., 283 U.S. 654, 75 L. Ed. 1333, 51 S. Ct. 592 (1931) 16

Louisville & Nashville Railroad v. Maxwell, 237 U.S. 94, 59 L. Ed. 853, 35 S. Ct. 494 (1915) 16

Louisville & Nashville Railroad v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 70 L. Ed. 242, 46 S. Ct. 73 (1925) 16

Massachusetts Trustees v. United States, 377 U.S. 235, 12 L. Ed.2d 268, 84 S. Ct. 1236 (1964) 11

Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir., 1970) 18

Mitchell Coal & Coke Co. v. Pennsylvania Railroad, 230 U.S. 247, 57 L. Ed. 1472, 33 S. Ct. 916 (1913) 16

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 96 L. Ed. 912, 71 S. Ct. 692 (1951) 13

Pennsylvania Railway v. International Coal Mining Co., 230 U.S. 184, 57 L. Ed. 1446, 33 S. Ct. 893 (1913) 16

Procter & Gamble Co. v. Ideal Truck Lines, 355 F. Supp. 547 (W. D. Mo., 1973) 10, 15

Ringsby Truck Lines, Inc. v. United States, 263 F. Supp. 552 (D. Colo., 1967) 18

Shapiro v. United States, 335 U.S. 1, 92 L. Ed. 1787, 68 S. Ct. 1375 (1947) 11

Shaw Warehouse Co. v. Southern Railway, 294 F. 2d 850 (5th Cir., 1961) 14

Surcharges, New York State, 62 M.C.C. 117 (1953) 8

Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907) 14, 16

Texas & Pacific Railway v. Mugg, 202 U.S. 242, 50 L. Ed. 1011, 26 S. Ct. 628 (1906) 13

T.I.M.E., Inc. v. United States, 359 U.S. 464, 3 L. Ed.2d 952, 79 S. Ct. 904 (1959) 8, 12, 13

United States v. Associated Transports, Inc., ____ F. Supp. ____ (D.D.C., 1972) 17

United States v. Champlin Refining Co., 341 U.S. 290, 95 L. Ed. 949, 71 S. Ct. 715 (1950)..... 14

United States v. Davidson Transfer & Storage Co., 259 F.2d 802 (D. C. Cir., 1958) 8

United States v. Western Pacific R.R., 352 U.S. 59, 1 L. Ed.2d, 77 S. Ct. 161 (1956) 12, 13

Statutes

5 U.S.C. §551 (10) (A), (B), (C), (E), (G) 9

5 U.S.C. §558(b) 9

28 U.S.C. §1254 (1) 2

28 U.S.C. §1336 (a) 18

28 U.S.C. §1337 6

Interstate Commerce Act, Part I

49 U.S.C. §15 (7) 8

49 U.S.C. §16 (2) 2, 3, 6, 7, 8, 9, 15

49 U.S.C. §16 (12) 15

49 U.S.C. §16 (13) 7

Interstate Commerce Act, Part II

49 U.S.C. §304a (2), (5) 12

49 U.S.C. §304 (d) 7

49 U.S.C. §305 (g) 3, 7, 8

49 U.S.C. §316(g) 12

49 U.S.C. §317 (c) 12

49 U.S.C. §322 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Admiral-Merchants Motor Freight, Inc., et al.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in these proceedings (consolidated in the Court of Appeals) on July 12, 1973.

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[1] Other Petitioners: Brady Motorfrate, Inc., Poole Transfer, Inc., Burlington Truck Lines, Inc., Dohrn Transfer Co., I & S-McDaniel, Inc., Interstate Motor Freight System, Knox Motor Service, Inc., Rock Island Motor Transit Co., Spector Freight System, Inc., and Yellow Transit Freight Lines, Inc.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is reported unofficially at 1973 Federal Carrier Cases para. 84,420, and 42 U.S. L. W. 2072.

The opinions of the trial court which were affirmed are in part reported at 337 F. Supp. 674, 337 F. Supp. 683 and 342 F. Supp. 166. All decisions are set forth in the appendices.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 12, 1973. A timely petition for rehearing *en banc* was denied on September 19, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether § 16(2) of Part I of the Interstate Commerce Act has been incorporated into the Motor Carrier Act so as to establish a private cause of action for enforcement of an I.C.C. "refund" order against motor carriers.

2. Whether an I.C.C. finding of "not shown just and reasonable" entered in a motor carrier rate-making proceeding is a sufficient predicate for post-shipment awards of damages to complaining shippers.

3. Whether motor carriers may be held to have "tacitly agreed" to deviate from effective increased tariff levels and thereby be deprived of effective defenses in suits for refunds of the increases where they assert: (1) that the past charges were affirmatively reasonable when tested upon the historic facts surrounding the traffic; and (2) that compliance with the contested I.C.C. refund language would result in confiscation; and (3) that the refund "order" is void.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§ 16(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

§ 305(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this Title: *Provided,* That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

STATEMENT OF THE CASE

These cases involve a court's "enforcement" of an Interstate Commerce Commission (hereinafter referred to as "the Commission" or "the I.C.C.") refund order against motor carriers in a shipper's actions for damages.

During the course of a general revenue investigation proceeding, upon request of certain Protestants (which had been acquiesced in by the motor carrier respondents), the I.C.C. granted a *necessary* continuance. The procedural order of April 25, 1968, however, contained a refund mandate in the language of a condition:

> *And it is further ordered,* That respondents be, and, they are hereby ordered to make refunds to the shippers on any shipments moving after May 20, 1968, to the extent that the increases on any portion thereof under investigation herein are not approved by the Commission, Appx. 143.[2]

The carrier respondents filed a petition for reconsideration to this order, then withdrew the petition leaving the order stand "as issued".

Following hearing, the I.C.C. entered its report and order, finding the increased rates (which had become effective *without suspension*) "have not been shown to be just and reasonable" and ordered their cancellation. Appx. 24. This failure of proof finding was due to the rejection of certain evidence with the resultant failure "to present a sufficient showing with regard to the effect of the wage increases upon total expenses and unit costs of the carriers". Appx. 24. The I.C.C. . . .

> . . . *further ordered,* That, in accordance with the order entered herein on April 25, 1968, the

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[2]The reference is to the first Appendix filed in the Seventh Circuit. A Supplemental Appendix (S. Appx. ___) was filed in the second series of 8 cases, later consolidated in the Seventh Circuit. The Appendices to this Petition are referenced by page number (e.g., "B-6").

> respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable. Appx. 24.

The motor carriers sought further hearing directed at the refund language based upon tendered evidence concerning the actual experience of the carriers under the "proposed" rates. On August 29, 1969, the I.C.C., based upon the same evidence, permitted even higher rates to take effect from the day following the date of cancellation of the investigated increases, but denied reconsideration or further hearing on the refund language. The Commission did modify its prior decision slightly ordering:

> . . . that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence. Appx. 146.

Upon further petitions by the carriers and by certain shipper protestants, the Commission denied the relevancy of reparations decisions to the order which it entered in the rate-making proceeding. Simultaneously, the protestants' prayer for (1) an accounting or (2) a self-executing pay-back order was denied,

> because the order of August 29, 1969, did not change the liability for making refunds, previously determined, but appropriately placed the burden for supporting claims for refunds upon the shippers who paid the charges. Appx. 233.

Later, the Commission

> Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate

> pleading, that the true basis of the shippers' right to a refund is their common law remedy for restitution . . .. Appx. 203.

Certain of the motor carriers applied for injunctive relief to the three-judge court, continuing to maintain that the Commission was without authority to award refunds under Part II of the Act. Holding that the I.C.C. had no common law (321 F. Supp. at 358), or statutory (321 F. Supp. at 358) power to enter a refund order, and that as a procedural device it could not commend the Commission action (321 F. Supp. at 360), the three-judge court nevertheless refused to annul the refund order, because of the motor carriers' initial withdrawal of objection to the inchoate refund language contained in the I.C.C. order which granted the continuance.[3] This Court affirmed the three-judge dismissal of the Urgent Deficiencies Act suit and denied the motor carriers' petition for rehearing. 404 U.S. 802; 404 U.S. 987.

On May 19, 1970, Alcoa commenced eleven section 304a reparation suits, erroneously alleging that the rates had been found unjust and unreasonable. Appx. 10. The jurisdiction of the trial court was invoked under 28 U.S.C. § 1337, only. Appx. 8. Although it had not been a party to either the I.C.C. case or the direct appeal, Alcoa on May 7, 1971 and March 14, 1972, moved for summary judgments for damages based on the enforcement provisions of section 16(2) of Part I of the Interstate Commerce Act. Holding that the claims for enforcement were properly and timely presented, and that claims would lie under § 16(2) against motor carriers, and that the I.C.C. order was valid and enforceable, the trial court granted judgment, including pre-judgment interest (commencing prior to the last shipments and payments involved), costs and attorney fees against the motor carriers. The Seventh Circuit affirmed, essentially adopting the trial court's rationale.

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[3] *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp. 353 (D. Colo., 1971), aff'd 404 U.S. 802, reh. den. 404 U.S. 987 (1971).

REASONS FOR GRANTING THE WRIT

The great importance of the novel Seventh Circuit interpretation and construction of the involved sections of the Interstate Commerce Act is underscored by the direct and the potential ramifications of the decisions below in an enormous volume of related cases presently pending throughout the United States. Direct and substantial conflicts with prior rulings of this Court are presented. The manifest injustice of the results, coupled with the lack of uniformity in results to date, indicates the necessity for the exercise of this Court's powers of supervision and for prompt resolution of the issues presented.

Essential to the determination that a claim would lie against motor carriers under § 16(2) of Part I of the Interstate Commerce Act[4] was the holding that § 16(2) had been incorporated by implication into the Motor Carrier Act through section 305(g).[5] Compare the *express* incorporation of section 16(13) into Part II. 49 U.S.C. § 304(d). Conceding the carriers' contentions that . . .

> (a) the legislative history of § 305(g) is devoid of any such Congressional intent; (b) the Commission has made numerous attempts to influence Congress to pass legislation similar to Sections 8, 9, 13(1) and 16 to be added to Part II; and (c) there is not a single case in which Section 305(g) was utilized to create a cause of action by incorporation of Section 16.[6]

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[4]Part I, generally, regulates rail carriers and petroleum pipeline carriers except when the provisions thereof are expressly incorporated by a cognate provision of another part of the Act governing the activities of another type of carrier.

[5]The trial judge rejected all other grounds for relief. Thus, resolution of the issue of whether § 16(2) has been incorporated into Part II would be controlling of the ultimate outcome of the cases. See unreported decision of Chief Judge McManus in *Amana Refrigeration, Inc. v. Bruce Transfer & Storage Co.*, Civil Nos. 70-C-13-CR, 70-C-14-CR, 71-C-19-CR, 71-C-21-CR (N. D. Iowa, 1973), appeal pending, 8th Cir. Nos. 1507-1510.

[6]1973 F. Carr. Cas. para. 82,420, p. 56223.

the Seventh Circuit relied upon "the plain language" of Section 305(g). But that plain language had been unchanged since 1959, when this Court ruled:

> . . . §§ 13(1) and 16 of Part I give a shipper . . . the right . . . to enforce his reparation award in the courts, *and Part II contains no comparable provisions. T.I.M.E., Inc. v. United States*, 359 U.S. 464, 470, 471 (1959).[7]

The direct conflict between the Seventh Circuit's decision and the cited prior decision of this Court is express. In applying[8] the "plain language", the Circuit utterly disregarded several of the fundamental precepts normally applied in construing and interpreting the various sections of the various Parts of the Interstate Commerce Act – including the rule: *expressis unius est exclusis alterius.* Not only does Part II not include a provision permitting the I.C.C. to order refunds (such as is contained in § 15(7) of Part I), but there is no provision for private enforcement of such an order in Part II.

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[7]This ruling, in *T.I.M.E.*, was essential to the result therein reached. If sections 8, 9, 13(1) and 16 had been in Part II by inclusion under § 305(g), the shippers' contentions made in *T.I.M.E.* would have prevailed, for then the Circuit determination to remand to the I.C.C. would have been proper. But this Court concluded that the I.C.C. was without jurisdiction to resolve the questions of the past reasonableness of the charges involved. The Davidson portion of the *T.I.M.E.* appeals was almost duplicative of the historical background of these cases. See *Surcharges, New York State*, 62 M.C.C. 117 (1953); *United States v. Davidson Transfer & Storage Co.*, 259 F.2d 802 (D.C. Cir., 1958). *And*, the refund concept had been not only considered, but rejected in the Davidson portion of the *T.I.M.E.* case, a determination not affected by this Court's reversal on other grounds.

[8]The "plain language" of § 16(2), of course, expressly provides that suit may be brought if there is no compliance "within the time limit in such order". In applying that "plain language", the Circuit concluded that

> . . . there [is] no statutory requirement that a refund order issued pursuant to this procedural authority contain a time limit for compliance.

If the "right of relief" provisions of § 16(2) are incorporated into Part II, it is certainly arguable that *all* of the "relief" provisions of Part I are incorporated – a result patently out of accord with Congressional intent and a host of prior decisions of this Court. Indeed, such a result would render much of Part II redundant and wholly unnecessary legislation.

This Court's supervisory powers should be invoked when judicial legislation of the magnitude involved in this case occurs. The practical impact of the decision of the Circuit is of great and continuing consequence – and, not only upon these litigants and related cases. The decision will have repercussions in virtually all future I.C.C. general revenue investigations and rate proceedings.

The eleven cases consolidated in the court below are but a tiny fraction of the cases pending which are predicated upon the same order and usurpation of power by the I.C.C.[9] In total, the order has induced over 125 shippers to commence suit. These cases are being defended by more than 1000 motor carriers. The 143 complaints filed to date were brought in 21 different state and federal courts.[10] In the cases still in the trial courts, applications to add hundreds of additional plaintiffs are pending. One case is postured as a class action. The prayers of these assorted complaints range from 38 cents to twenty-five million dollars. The cases to which this Petition is directed constitute the "lead" cases by virtue of having been resolved first. The decisions to which this Petition is directed have already been followed in part in determinations by other trial judges across the country. The decisions to date, which are predominately adverse to the carriers, are uniform only in their lack of consistency in the application of the principles of the

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[9]The imposition of the refund requirement, whether entered as a condition or as a mandate, was a *sanction* against the motor carriers *by definition* under the A. P. A., 5 U.S.C. § 551 (10) (A), (B), (C), (E), (G). And, that Act provides that "A sanction may not be imposed . . . *except within jurisdiction delegated to the agency and as authorized by law*". 5 U.S.C. § 558(b). (Emphasis added).

[10]See Appx. A, attached, A-1, for a current synopsis of this mass of litigation.

Interstate Commerce Act.[11] Already, Appellate proceedings have been commenced in three Federal Courts of Appeals, concerning 28 of these cases.

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[11]See Appendix A, A-1. For example, in *Container Corp. v. Admiral-Merchants Motor Freight, Inc.*, (unreported) (N.D. Ill., 1972), on appeal, 7th Cir. No. 72-1646, the shippers' complaint was dismissed and motion for summary judgment denied. And, in *American Home Products Corp. v. A. & B. Transfer Co.*, (unreported) (N.D. Ill., 1972) the shippers' motion for summary judgment was denied. And, in *Bela Seating Co. v. Advance Transportation Co.*, 344 F. Supp. 854 (N.D. Ill., 1972) the shippers' motion for summary judgment was denied. Other cases have granted virtually identical motions: *Amana Refrigeration, Inc. v. Bruce Transfer & Storage Co.*, (unreported) (N.D. Iowa, 1973), appeal pending 8th Cir. Nos. 73-1507-1510; *Land O' Lakes, Inc. v. United Buckingham Freight Lines, Inc.*, 351 F. Supp. 102 (D. Minn., 1973); etc.

Res Judicata has been applied in these cases by the 7th Circuit, but the trial court refused to hold it technically applicable. The *American Home* decision, *supra*, likewise rejected its applicability. But it was applied in, e.g., *Procter & Gamble Co. v. Ideal Truck Lines*, 355 F. Supp. 547 (W. D. Mo., 1973) and *Land O' Lakes, supra*.

In *Container Corp., supra*, Judge Austin found no cause of action for restitution, overcharges, reparations or enforcement. In these cases, Judge Will rejected overcharges, restitution and reparations, but gave birth to the enforcement rationale. In *Procter & Gamble, supra*, the *Alcoa* rationale was followed as to enforcement, but rejected as to restitution, Judge Hunter ruling that as an alternative ground for relief. In *Land O' Lakes*, the trial judge rejected overcharges and restitution, but allowed enforcement and reparations. In *Amana, supra*, restitution was rejected and enforcement allowed.

In *S. S. Kresge Co. v. A. & B. Transfer*, (unreported) (E.D. Mich., 1972), appeal pending 6th Circuit No. 72-1967, summary judgment was granted, but no interest or fees allowed. In *Alcoa, Amana*, and *Land O' Lakes*, etcetera, fees were awarded in greatly varying amounts. In *Alcoa* interest was awarded at 6% from June 5, 1969. Similarly, in *Land O' Lakes*. In *Amana*, interest was awarded at 4% from Oct. 12, 1971. In two of the three *United States* cases interest has been at 4% from (a) June 5, 1969 and (b) May 4, 1970. In *Western Electric Co. v. Burlington Truck Lines, Inc.*, (unreported) (W. D. Mo., 1973), on appeal, 8th Circuit No. 73-1200, interest was allowed at 6% from June 25, 1970. In an Oct. 9, 1973 decision by the trial judge in these cases, *Levey Division v. Abel Freight Lines, Inc.*, (unreported) (N. D. Ill., 1973), Civil No. 71-C-1247, interest was awarded at 6% from June 5, 1969 except as to shipments upon which payment was not made until after that date. In

Certiorari was granted by this Court in *Federal Trade Comm'n v. Jantzen, Inc.*, 386 U.S. 228, 229 (1967), a case involving the enforceability of an order similar to a large number of other administrative orders. It is respectfully submitted that the circumstances appearing in this instance should also induce the Court to invoke its prerogative to review. Certiorari may also be granted because a considerable number of suits pending in the lower courts will turn on the resolution of the issues presented. See *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1964). The importance of the question of statutory construction involved is obvious. Cf., *Shapiro v. United States*, 335 U.S. 1, 4 (1947).

The potential impact of these cases reaches far beyond the I.C.C. order directly involved. For now that the I.C.C. apparently has succeeded in accomplishing indirectly (through an inferred procedural device) what it was precluded from doing directly (i.e., ordering refunds), it is certain that similar action will be urged by shippers and taken by the Commission in the future.

The result of the decision below is, and its future effect will unquestionably be, the upsetting of that delicate balance established by Congress in the rate-making provisions of the Motor Carrier Act. For if shippers may, as here, recover amounts

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[11] (Continued)
Procter & Gamble, supra, 6% was allowed from August 20, 1970. No interest was awarded, nor were costs awarded in *Bemis Co., Inc. v. Burlington Truck Lines, Inc.*, (unreported) (N. D. Ill., 1973), appeal dismissed upon stipulation on outcome of *Alcoa.*

In *Alcoa,* Judge Will indicated the date of the order as Aug. 27, 1969, from which the statute of limitations under § 16(3) (f) would run. In *Bela, supra,* the ruling was that the statute would not run until March, 1972. This latter decision was followed in *Amana, supra,* etcetera, but rejected in *Container Corp.*, wherein a complaint filed after June 5, 1969 was foreclosed. Judge Parsons, in *American Home, supra,* has permitted intervention and assertion of new claims by new shippers against new carriers since March of 1972 notwithstanding the substantive nature of the limitations provision.

The textual rationale for the decisions is as varied as the results have been. The lack of *uniformity* is apparent. Compare *Keogh v. Chicago N. W. R.R.*, 260 U.S. 159 (1922).

paid under *effective* increased rates (either investigated but not suspended, or established following suspension), then every semblance of the prior legislative balance is undermined. See discussion in *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 479, 480 (1959). Congress provided for a statutory 30-day period before filed rates could become effective. 49 U.S.C. §317(c). Congress added to the delay in the establishment of such rates when it granted the I.C.C. power to suspend such rates for 7 months beyond the initial 30-day waiting period. 49 U.S.C. §316(g). In theory, the I.C.C. was to ascertain, within that period, the reasonableness of the proposed rates for the future. If the determination were not made within that time, the rates nevertheless became effective, thus granting the carriers some relief (albeit belated) from the operation of the administrative lag. The lag, if any, in excess of 8 months, was to be borne by the shipping public. No relief was provided in the Act for the carriers. That is, they can never recover the revenues "lost" during the lag if the rates are shown to be reasonable for the future. But, previously, a balance was achieved by precluding shippers from recovering the increases in the event the proposed, but effective, rates were not proven reasonable for the future.[12] The result of *these* cases, however, is to thrust an entire 17 month lag solely upon the carriers. Not only must the carriers suffer the entire delay prescribed by statute, but, in filing for increases, they must now risk punitive repayment orders should they fail to sustain the rates for the future. Considering the constant change in evidentiary requirements, that risk is not even subject to evaluation.

Furthermore, according to the Seventh Circuit, the carriers may not even rely upon the historic facts surrounding the shipments to show that the rates actually applied to the past shipments were reasonable.[12a] Rather, the *rate-making* failure-of-proof finding was held to result in recovery, even though there had been neither proof of any injury to the shipper nor proof of *actual* judicial unreasonableness of the charges *when applied*. It is no defense, according to the Circuit, that the *projections*

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[12]Since 1965, of course, the shippers have had a remedy for reparations if the Commission, upon reference, finds particular past charges *affirmatively* unjust and unreasonable. 49 U.S.C. §§304a(2), (5).

[12a]Or, not unreasonable. Compare *United States v. Western Pacific R.R.*, 352 U.S. 59, 1 L. Ed.2d 126, 77 S. Ct. 161 (1956).

of fact involved in the rate-making proceeding were unlike the facts which actually existed when the shipments were being transported under the proposed rates.

The obligations imposed on the carriers *exceed* even a return to the pre-increase level. The court has awarded costs, punitive attorney fees and prejudgment interest running from a date 3 months *prior* to the date on which the rates were cancelled under the I.C.C. order. The carriers are *worse* off than if they had never *sought* an increase. Yet the I.C.C. found that the experience under the increased rates justified even higher rates for the future than those which it concurrently ordered cancelled.

With this unprecedented threat hanging over their collective heads, management and sound business planning by these pervasively regulated carriers is rendered impossible. Monies deemed essential for continued operations cannot be used for in excess of a year or more until the Commission rules upon proposed increases. And if, as here, a critical portion of the proof in the investigation case is rejected upon a technicality, the carriers may not be able to retain the money, even though they may be able to prove that their *actual* expenses exceeded the projected expense level.

To prophesy confiscation as a result is sheer understatement – the result will be devastating to the entire transportation industry and, in turn, to the public which it serves, unless this Court intervenes.

In denying the motor carriers' confiscation and reasonableness defenses, the Circuit resorted to equitable considerations previously expressly rejected by this Court as a predicate for permitting deviation from effective rate levels. Compare the Circuit decision with *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242 (1906); *Gulf, Colo. & Santa Fe Ry. v. Hefley*, 158 U.S. 98 (1895); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963); *Central Ky Nat'l Gas Co. v. R.R. Comm'n*, 290 U.S. 264 (1933); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939), *reh. den.* 308 U.S. 631 (1939); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). Such estoppels are not available to *private* shippers. *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956).

The Circuit reasoned that the carriers were precluded from contesting the refund requirement further because of the "tacit acceptance" (by withdrawal of petition) of the inchoate refund condition. This argument was reinforced by the holding in the court below that the three-judge court's refusal to annul stood as *res judicata* on the question of the validity of the refund requirement. Normally, validity would be an issue in an enforcement case and *only* contestable *there* when an order for the payment of money is involved. *Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576 (1966). The court below reasoned that since the three-judge court had declined to annul (for equitable reasons) its action must have been an *affirmance* of the I.C.C. order. Compare *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470 (1952) (F.T.C. affirmed, but enforcement denied); *Shaw Warehouse Co. v. Southern Ry.*, 294 F.2d 850, 851, 852 (5th Cir., 1961), *cert. den.* 369 U.S. 850, *reh. den.* 372 U.S. 950 (1962). And see *United States v. Champlin Refining Co.*, 341 U.S. 290 (1950) and *Champlin Refining Co. v. United States*, 329 U.S. 29 (1946).

Of repeated concern to the court below was the carriers' alleged "agreement" to the refund requirement. In sustaining the summary judgment, the Circuit gave no attention to the counter-affidavits on the issue (S. Appx. 156) and disregarded long-established precedent in this Court that

> . . . the contention made, if adopted, would necessitate the holding that a cause of action in favor of a shipper was from the failure of the carrier to make an agreement, when, *if the agreement had been made* [to deviate from the effective rate levels], both the carrier and the shipper would have been guilty of a criminal offense and *the agreement would have been so completely void as to be impossible of enforcement. Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 445 (1907). (Emphasis added).

See also *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 665-66 (1963); *Hope Natural Gas Co. v. Federal Power Comm'n*, 196 F.2d 803 (4th Cir., 1952). The conflict with the 4th Circuit is shown in *Lynchburg Traffic Bureau v. Smith's Transfer Corp.*, 339 F.2d 478 (4th Cir., 1964).

Having once created a cause of action by the incorporation of §16(2) into Part II,[13] the Circuit encountered yet another difficulty: Section 16(2) makes the findings and order of the I.C.C. only *prima facie* evidence of the facts stated therein. But, the I.C.C. finding was a legislative finding that the rates had not been shown just and reasonable for the future; and the plaintiff was seeking judicial relief on *past* shipments. Nevertheless, the Circuit found that the not shown finding was of conclusive significance and that the finding supported the result reached below. Again, well-established precedent in this Court was disregarded. Compare, for example, one of the most recent pronouncements of this Court:

> *If* the Commission finds that the proposed rates are unreasonable, *rather than* that the railroads failed to carry their burden of proof, that finding *might* be conclusive in a subsequent proceeding. *Atchison Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 37 L. Ed. 2d 350, 365, 41 U.S. L. W. 4905, 4909, at n. 9 (1973) (Emphasis added).

The court below fails to explain *how* the prospective "not shown" finding in a legislative rate-making general revenue investigation related to a post-shipment judicial award of damage. It merely stated that the carriers' failure to file *counter*-affidavits made the "not shown" finding binding, if it were not otherwise conclusive.[14] But, if the historic facts pertaining to the shipments were relevant to damages to be awarded upon those shipments, there was nothing to counter, since the only "evidence" submitted by the shipper related to the failure of proof which in turn related to projections of fact designed to

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[13]Compare §16(2) and §16(12) with §322 on issue of who is *expressly* authorized to bring suit to enforce orders under Part I and Part II.

[14]"Counter" affidavits *were* filed to no avail in almost all related litigation, including more recent cases than these decided by Judge Will, trial judge in these cases, and proof of confiscation and reasonableness was rejected in *Proctor & Gamble Co. v. Ideal Truck Lines*, 355 F. Supp. 547 (W. D. Mo., 1973) and related cases, now 8th Cir. Docket Nos. 73-1200, 1201, 1202.

show only that the rates when applied in the future would be reasonable. The result of the Circuit's rationale is to *equate* a "not shown" finding with an affirmative finding that the rates charged on the particular shipments involved were "unjust and unreasonable when charged in the past". The *latter* finding is *essential* to an award of damages. See *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 249 (1913); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932); *Baer Bros. Mercantile Co. v. Denver & Rio Grande W. R.R.*, 233 U.S. 479, 486-89 (1914); *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654 (1931); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine R.R. v. Hooker*, 233 U.S. 97 (1914); *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Pennsylvania R.R. v. International Coal Min. Co.*, 230 U.S. 184 (1913); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939), *reh. den.* 308 U.S. 631 (1939). *And see* Judge Learned Hand's decision in *Feinstein v. New York Central R.R.*, 159 F. Supp. 460 (1958).

The rationale of the Circuit thus parlayed two inconclusive determinations (the I.C.C. "not shown" finding and the three-judge court's refusal to annul) into strict liability.

The courts below have supplied the missing rationale for the "equitable considerations" found to exist which, according to the Circuit, warranted the strict liability result. These findings and considerations were wholly absent from the I.C.C. decisions and orders, unsupported by the facts of record below or before the Commission, contradicted by the affidavits below, contrary to the rationale offered by the Commission before the three-judge court in defense of its order, and, as noted *supra*, contrary to the established law. Not only did the I.C.C. urge that its order was not to be construed as a self-executing requirement, but the Commission argued that since it lacked power to order payment, its order was merely a permission to the carriers to settle *if* they had been unjustly enriched. See S. Appx. 78, 79, *et seq.*; S. Appx. 47, *et seq.* The I.C.C. acknowledged that it had not *found* unjust enrichment and

that it did not know whether or not the rates were just and reasonable. Thus, the decision below departs from the time-honored principle that rationale missing in an agency decision should not be supplied by the courts. Cf., *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). The Circuit has permitted the Commission to escape its statutory duty to determine the reasonableness of rates and ratified termination of a case on incomplete evidence when complete evidence was readily available (and would have been produced in defense below, if permitted).

> They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or non-representative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . .. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . .. Statement of former Commissioner Aitchison of the Interstate Commerce Commission frequently quoted, as in *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S. D. N. Y., 1951).

Despite the sound logic of the "balls and strikes" doctrine, the Commission has continued to terminate these important general revenue proceedings with "not shown" findings – and *that* has resulted in an additional multitude of litigation over the years by which shippers are seeking refunds of increased rates neither found reasonable nor unreasonable. For pending cases, see *United States v. Associated Transports, Inc.*, (unreported) (D.D.C., 1972), Civil No. 2003-71, appeal to the D.C. Cir.

No. 72-1946, and related cases; *Ringsby Truck Lines, Inc. v. United States*, 263 F. Supp. 552 (D. Colo., 1967), and related cases; *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir., 1970) and related cases. See also, e.g., *Feinstein v. New York Central R.R.*, 159 F. Supp. 460 (S.D. N.Y., 1958) and related cases; *Interstate Commerce Comm'n v. Inland Waterways Corp.*, 319 U.S. 671 (1943).

The questions posed have not been but should be resolved by this Court. The Commission's order is unique in the history of the Motor Carrier Act. The judicially-announced incorporation of the Part I statutory enforcement cause of action into Part II is unique. But of even greater importance is the manifest violation of the principles of due process: the damages awards were made below *without any test of the actual facts surrounding the shipments* of freight upon which the plaintiff was claiming that it was entitled to a return of a portion of the effective rates.

The disruptive effects of the determinations below extend to infringement upon one of the underlying principles of the Act essential to effective regulation of motor carriers – the uniformity of rates. While to date, hundreds of shippers have claimed against some of the carriers, many others have not. The interest and fee awards by the various courts which have ruled have been almost as varied as the number of decisions. See Appx. A, attached, column (f), The resultant lack of uniformity in the net rates ultimately paid by the shippers is obvious. Compare *Keogh v. Chicago & N.W. R.R.*, *supra.*

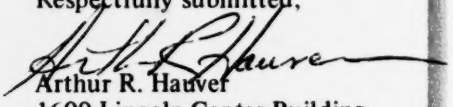
Moreover, the Circuit's action sanctioned lower court judgments beyond and virtually unrelated to the unamended complaints. Even the essential jurisdiction of the lower court under 28 U.S.C. § 1336(a) was unpleaded to support the tenuous cause of action created. Such a travesty as here appears would call for the exercise of this court's powers of supervision even if the other departures "from the accepted and usual course of judicial proceedings" were not so abundant.

CONCLUSION

The Seventh Circuit has decided important questions of federal law which have not been, yet certainly should be, settled by this Honorable Court. Furthermore, the decision below has been decided in a way diametrically contrary to the prior rulings of this Honorable Court. The judicial legislation reaches a result consistently rejected by Congress for 38 years and deprives an entire industry of a fair and impartial judicial test of the relevant historic facts. Exercise of this Court's supervisory function is indicated for the resolution of the conflicting decisions and for resolution of the important questions under the commerce laws pertaining to regulated motor carriers.

WHEREFORE, premises considered, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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